IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.,

G. ISAAC SPONAUGLE, III,
West Virginia citizen and taxpayer,

Petitioner,

v.

JAMES CONLEY JUSTICE, II,
Governor of the State of West Virginia,

Respondent.

Civil Action Number: 18-P-442
Honorable Charles E. King, Judge

RESPONDENT'S MOTION TO CERTIFY QUESTIONS AND STAY FURTHER PROCEEDINGS

James Conley Justice, II, Governor of the State of West Virginia (hereinafter "Respondent"), by counsel, respectfully moves this Court, pursuant to W. Va. Code § 58-5-2 and Rule 26(c) of the West Virginia Rules of Civil Procedure, to certify the following questions to the West Virginia Supreme Court of Appeals and stay all further proceedings in this case until such questions have been decided:

I. As a matter of law, is mandamus available to compel the Governor of the State of West Virginia to "reside" at the seat of government?

II. Is the duty to "reside" at the seat of government sufficiently clear, defined, and free from elements of discretion that it can be enforced through mandamus without improperly prescribing the manner in which the Governor shall act?

III. Does prescribing the amount of time the Governor must spend in Charleston, and/or restraining his discretion to determine where he will be present on any given day under any given set of circumstances, involve non-justiciable issues and run afoul of the political question doctrine and corresponding separation of powers principles?

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IV. Is mandamus available to compel a general course of conduct to be performed over a long period of time, as opposed to a discrete act, especially where it would require a court to monitor and supervise the conduct of the State's Chief Executive on an ongoing basis?

V. If mandamus is available to compel the Governor to "reside" at the seat of government, what is the definition of "reside" in the context of W. Va. Const. art. VII, § 1 and W. Va. Code § 6-5-4, and what are the specific parameters of the character and amount of time that the Governor must spend at the seat of government before he is deemed to be "residing" there?

In support of this motion to certify the above-stated questions, Respondent states as follows:

1. Petitioner G. Isaac Sponaugle, III (hereinafter "Petitioner") filed the instant Petition for Writ of Mandamus against Respondent, in his official capacity as Governor of the State of West Virginia, asking this Court to order Respondent to "reside at the seat of government during his term of office, and keep there the public records, books and papers pertaining to his respective office[.]"

2. On February 19, 2019, Respondent filed a motion to dismiss the Petition (together with a supporting memorandum of law), arguing that Petitioner is not entitled to a writ of mandamus as a matter of law. More specifically, Respondent argued that (1) mandamus cannot be employed to prescribe the manner in which a government official shall act, and the duty to "reside" at the seat of government is so nebulous and laden with discretion that any writ granted in this case would necessarily involve prescribing the manner in which the Governor shall act, thereby improperly encroaching on his autonomy and violating the political question doctrine and corresponding separation of powers principals; (2) mandamus is not available to compel a general course of conduct to be performed over a long period of time (as opposed to a discrete act), especially where, as here, it would require this Court to monitor and supervise the conduct of the State's Chief Executive on an ongoing basis; and (3) mandamus is unavailable where, as here, other adequate remedies exist.

3. By Order dated July 17, 2019, this Court denied Respondent's motion to dismiss. In

doing so, the Court implicitly ruled that mandamus is at least theoretically available to compel Respondent to "reside" in Charleston. However, the Court's Order did not attempt to define the parameters of the duty to "reside" in Charleston, nor the nature and/or threshold amount of time that Respondent must spend in Charleston before he is deemed to be "residing" there.

4. This Court has statutory authority to certify the above-stated questions to the West Virginia Supreme Court of Appeals by virtue of W. Va. Code § 58-5-2, which provides as follows:

> *Any question of law*, including, but not limited to, questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party, *may, in the discretion of the circuit court in which it arises, be certified by it to the Supreme Court of Appeals for its decision*, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back. The procedure for processing questions certified pursuant to this section shall be governed by rules of appellate procedure promulgated by the Supreme Court of Appeals.

W. Va. Code § 58-5-2 (emphasis added). The first four of the above-stated proposed certified questions go to whether mandamus is legally available to compel the State's Chief Executive to "reside" at the seat of government, and are plainly questions of law. Similarly, the meaning of "reside" in this context, and the specific parameters of the duty to reside, are questions of law.

5. Further, the aforementioned questions arise from Respondent's motion to dismiss. The West Virginia Supreme Court of Appeals has expressly held that "[a] question pertaining to the ruling of a circuit court upon a motion made in a civil action, pursuant to Rule 12(b) of the West Virginia Rules of Civil Procedure, to dismiss the complaint for failure to state a claim upon which relief may be granted may be certified to this Court pursuant to the provisions of Code, 1931, 58—5—2, as amended." Syl. Pt.1, Steeley v. Funkhouser, 169 S.E.2d 701, 701 (W. Va. 1969); *see also* Elmore v. State Farm Mut. Auto. Ins. Co., 504 S.E.2d 893, 894 (W. Va. 1998)(recognizing the

propriety of certifying a question following the denial of a motion for judgment on the pleadings); Adkins v. Merow, 505 S.E.2d 406, 408 (W. Va. 1997)(finding questions properly certified following denial of motion to dismiss).

6. Our Supreme Court of Appeals has also held that certified questions will not be accepted "unless there is a sufficiently precise and undisputed factual record on which the legal issues can be determined.... [and] such legal issues ... substantially control the case." McCammon v. Oldaker, 516 S.E.2d 38, 41 (W. Va. 1999)(*citing* Syl. Pt. 5, Bass v. Coltelli, S.E.2d 350 (W. Va. 1994)). Here, the questions proposed by Respondent are purely questions of law which require no further factual development. Again, these questions arise from Respondent's motion to dismiss, which contended that mandamus is not available in this case as a matter of law *even if the allegations in the Petition are taken as true*. The resolution of this issue is not dependent on any set of facts being proven or disproven, and no amount of factual development will change or address Respondent's arguments on this issue. Accordingly, there is a sufficient record on which the questions presented can be determined. *See e.g.* Elmore, *supra* (accepting certification of the purely legal question of whether there is a legally cognizable cause of action by a third-party claimant against an insurance carrier for breach of fiduciary duty and/or breach of the implied covenant of good faith and fair dealing).

7. Moreover, there is no question that the above-stated questions proposed by Respondent substantially control this case. If the West Virginia Supreme Court of Appeals agrees with Respondent that the duty to "reside" at the seat of government is too nebulous, undefined, and laden with discretion to be properly controlled through mandamus, or that this case presents a non-justiciable political question, or that mandamus is unavailable to control the performance of

continuing duties (as opposed to discrete acts), then Petitioner's request for a writ of mandamus ordering Respondent to "reside" at the seat of government must be dismissed. Likewise, if the Supreme Court of Appeals determines that mandamus is theoretically available in this case to compel Respondent to "reside" in Charleston, then the precise meaning of "reside" (including the nature and amount of time Respondent must spend in Charleston in order to satisfy his duty to "reside" there) will control every facet of this case going forward, from the proper scope of discovery to the parameters of any writ ultimately awarded.

8. In addition, certification of the above-stated questions is consonant with the purpose of W. Va. Code § 58-5-2. The West Virginia Supreme Court of Appeals has observed that "[t]he obvious underlying reason for this statute is to permit the adjudication of certain preliminary but essential matters before vexatious costs are incurred and needless delays take place in the ultimate and complete determination of the case." Leishman v. Bird, 129 S.E.2d 440, 442 (W. Va. 1963). Plainly, the above-stated questions bearing on whether mandamus is legally available to enforce the duty to "reside" in Charleston should be conclusively resolved *before* further vexatious costs are incurred in this litigation.

9. Indeed, the availability of mandamus to compel a state's chief executive to "reside" at a particular location is a novel issue and presents a question of first impression. Petitioner has not cited, nor has Respondent found, a single case in which a court employed mandamus to order a state governor to "reside" in any particular location and/or made any attempt to set specific criteria as to the nature and amount of time the governor must spend in that (or any) location. If, as Respondent has argued, mandamus is not legally available and Petitioner is therefore not entitled to the writ he seeks as a matter of law, then any and all time, effort, and taxpayer money spent on this

litigation (e.g. responding to and/or opposing Petitioner's discovery requests, preparing for and attending hearings, arguing various motions, etc.) will have been pointless and wasteful. Accordingly, the novel, purely legal issue of whether mandamus is available to compel the Governor to "reside" in Charleston (and the above-expressed questions of law intrinsic to the determination of that issue) should be presented to the West Virginia Supreme Court of Appeals before any further proceedings occur at the circuit court level.

10. Similarly, if mandamus *is* legally available to compel Respondent to "reside" in Charleston, then the precise meaning of "reside" in this context, and the specific nature and amount of time Respondent must spend in Charleston before he is deemed to be "residing" there, would of necessity have to be determined at the outset. As discussed in greater detail in Respondent's submissions in support of his motion to dismiss, the West Virginia Supreme Court of Appeals has observed that the word "reside" and its corresponding noun "residence" are "chameleon-like expressions" and are "like a slippery eel," in that they have no precise, universal definition that applies in all contexts. *See* Brooke B. v. Ray, 738 S.E.2d 21, 30 (W. Va. 2013). At times the Court has used the word "residence" interchangeably with "domicile," which has been defined as the place where a person "intends to retain as a permanent residence and go back to ultimately after moving away." Brooke B., 738 S.E.2d at 30 (citing Syl. Pt. 2, Shaw v. Shaw, 187 S.E.2d 124 (W. Va. 1972)).[1] At other times, the Court has indicated that "residence" refers to bodily presence. *See* Syl. Pt. 7, State ex rel. Sandy v. Johnson, 571 S.E.2d 333, 339 (W. Va. 2002)(stating that domicile is "a

[1] However, the Supreme Court of Appeals has made clear that domicile and residence are *not* synonymous, and that in many instances when the Court used the word "residence," it was actually referring to domicile. *See* Lotz v. Atamaniuk, 304 S.E.2d 20, 23 (W. Va. 1983); *see also* Brooke B., 738 S.E.2d at 30.

combination of *residence (or presence)* and an intention of remaining.")(emphasis added). The Court has further stated that although a person has only one domicile, a person may have several "residences." Brooke B., 738 S.E.2d at 30. Thus, at present, it is entirely unclear which, if any, of these meanings attaches to the word "reside" in the context of W. Va. Const. art. VII, § 1.

11. Further, none of the Supreme Court of Appeals' previous discussions of the words "reside" and "residence" took place in the context of a mandamus action to compel a public official to "reside" in a given location. As a result, there is a total lack of guidance as to the nature and amount of time a public official must spend in a given location in order to be in compliance with a court's directive to "reside" there. How many hours, days, and/or nights per week or per month must Respondent spend in Charleston before he is deemed to be "residing" there? Is he "residing" in Charleston if he sleeps there but departs in the morning and spends his waking hours elsewhere? Conversely, is he "residing" in Charleston if he spends some portion of his waking hours there but sleeps elsewhere? These questions should be conclusively resolved by the West Virginia Supreme Court of Appeals before this litigation proceeds any further, as the answers to these questions are necessary to determine the proper scope of discovery, evaluate whether Respondent is or is not already "residing" in Charleston, and define the parameters of any writ ultimately issued.

12. Concordantly, Respondent respectfully submits that this Court should stay all further proceedings pending the Court's decision on this motion to certify questions, and should ultimately stay all proceedings until the Supreme Court of Appeals has decided the certified questions.

13. West Virginia Code § 58-5-2 provides, in relevant part, that "[a]ny question of law . . . may, in the discretion of the circuit court in which it arises, be certified by it to the Supreme Court of Appeals for its decision, *and further proceedings in the case stayed until such question*

shall have been decided and the decision thereof certified back." W. Va. Code § 58-5-2. Our Supreme Court of Appeals has interpreted this language to mean that "[b]arring exigent circumstances, once a question is certified to this Court, all proceedings must be stayed in the circuit court pending the answer from this Court." Young v. JCR Petroleum, Inc., 423 S.E.2d 889, 893 (W. Va. 1992). This is a clear recognition that certified questions which substantially control the case should be decided *before* any further proceedings (which will be affected and perhaps nullified by the answers to the certified questions) take place.

14. While W. Va. Code § 58-5-2 does not expressly require a court to stay proceedings while a motion to stay is pending and questions have not yet been certified, this Court nevertheless has the discretion to stay proceedings until such time as the Court rules on this motion to certify. Rule 26(c)(2) of the West Virginia Rules of Civil Procedure allows a court to order that "discovery may be had only on specified terms and conditions, including a designation of the time or place." W.Va. R. Civ. P. 26(c)(2). The West Virginia Supreme Court of Appeals has recognized that "Rule 26(c)(2) may be used to stay discovery pending the outcome of a dispositive motion *or other matter*." State ex rel. Nationwide Mut. Ins. Co. v. Kaufman,, 658 S.E.2d 728, 735 (W.Va. 2008)(*citing* Cleckley, et al., *Litigation Handbook*, § 26(c)(2), p. 758)(emphasis added).

15. As previously discussed, the above-stated questions substantially control this case, and, if decided in Respondent's favor, will completely dispose of this case. However, Petitioner has served intrusive and burdensome discovery requests seeking detailed and sensitive documents and information about such matters as Respondent's sleeping habits, Respondent's movements throughout the State, and the location of Respondent's personal property. Petitioner even seeks to obtain records and copies of every single government-related phone call, email, and text message

that Respondent has made while away from his office at the West Virginia Capitol. Petitioner's discovery requests are thus disruptive of Respondent's enormous responsibilities as Governor of the State of West Virginia and invasive of the decision-making process of his Office.

16. Respondent should not be forced to devote time and resources to opposing and/or responding to these vexatious and disruptive discovery requests during the pendency of this motion, or at any point prior to the Supreme Court of Appeals' conclusive determination of whether Petitioner's novel petition to compel Respondent to reside at the seat of government is even legally viable. Again, the purpose of W. Va. Code § 58-5-2 "is to permit the adjudication of certain preliminary but essential matters *before* vexatious costs are incurred and needless delays take place in the ultimate and complete determination of the case." Leishman, 129 S.E.2d at 442 (emphasis added). This purpose would be largely defeated if Respondent must respond to burdensome discovery requests and litigate discovery disputes (all of which distract from the responsibilities of the office to which he was duly elected) while his motion to certify questions is pending.

17. Finally, even if the Supreme Court of Appeals answers the first four proposed certified questions in Petitioner's favor, the Supreme Court of Appeals' answer to the fifth proposed certified question (regarding the meaning of "reside" and the specific threshold Respondent must meet in order to be "residing" in Charleston) will guide this Court in resolving discovery disputes and determining the relevance of the documents and information sought by Petitioner. As such, it makes no sense to proceed with discovery before receiving the benefit of the Supreme Court of Appeals' guidance.

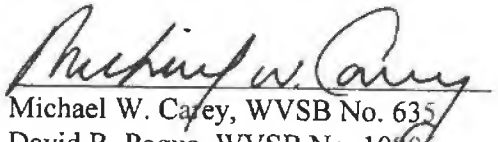
WHEREFORE, Respondent respectfully requests that this Court certify the above-stated questions to the West Virginia Supreme Court of Appeals, and to stay all further proceedings until

the Supreme Court of Appeals has decided such questions. Respondent certifies that he has in good faith conferred with Petitioner in an effort to resolve the latter request without court action.

Respectfully submitted,

JAMES CONLEY JUSTICE, II,
Governor of the State of West Virginia,

By Counsel,



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CERTIFICATE OF SERVICE

I, Michael W. Carey, do hereby certify that on the 29th day of July, 2019, I have served the foregoing **"Respondent's Motion to Certify Questions and Stay Further Proceedings,"** upon the following, via email and United States Mail, postage pre-paid, addressed as follows:

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